

Varbero v Candela

2023 NY Slip Op 31302(U)

March 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 517384/21

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 21st day of March, 2023.

PRESENT:

HON. CAROLYN E. WADE,

Justice

-----X

ANTHONY C. VARBERO,

Plaintiff,

Index No. 517384/21

-against-

DECISION, ORDER, and JUDGMENT

CALOGERO CANDELA and MARY CANDELA,

Mot. Seq. No. 2

Defendants.

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Recitation, as required by CPLR 2219 (a), of the electronic papers considered in the review of the joint cross-motion of defendants Calogero Candela and Mary Candela to dismiss the complaint as against them:

Notice of Cross Motion and Affirmation.....	<u>27-28</u>
Opposing Affirmation.....	<u>46</u>
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Upon the foregoing papers and after oral argument, in this action to impose a constructive trust on certain residential real property, the cross-motion of defendants Calogero Candela (“Calogero”) and Mary Candela (collectively with Calogero, “Defendants”) to dismiss the unverified complaint of plaintiff Anthony C. Varbero (“Plaintiff”), dated July 14, 2021 (the “complaint”),¹ as amplified by two affidavits, one by his neighbor Kevin Schwartz, dated June 22, 2021 (the “neighbor’s affidavit”),² and

¹ The complaint is not verified by either Plaintiff or his counsel (NYSCEF Doc No. 2).

² NYSCEF Doc No. 3.

the other by his plumber Scott Palma, dated July 6, 2021 (the “plumber’s affidavit”),³ pursuant to CPLR 3211 (a) (5) and (7), is decided as follows:

Facts and Allegations⁴

Plaintiff was married to Defendants’ daughter, nonparty Pietra Varbero (née Candela) (“Pietra”), from November 9, 2009 to August 31, 2022.⁵ They have three children together.⁶ In July 2011, Plaintiff and Pietra sought to acquire a two-family house located at 2272 56th Drive in the Mill Basin section of Brooklyn, New York (the “marital home”), which is located across the street from Defendants’ house.⁷ Lacking “the requisite credit to facilitate the transaction,” Plaintiff and Pietra agreed with Defendants that the latter would buy the marital home in their [Defendants’] name, “albeit subject to Plaintiff’s beneficial interest.”⁸ Plaintiff’s sole involvement with the purchase of the marital home was to negotiate a reduction in the purchase price.⁹ Defendants – using the funds obtained by Calogero from Pietra and from her former husband (nonparty Matteo Castelli) – put the down payment for the purchase of the

³ NYSCEF Doc No. 4.

⁴ To assist the Court with the understanding of the relationship between the parties and to further explain the chronology of the events set forth in the complaint, the Court has taken judicial notice of the Stipulation of Settlement, dated as of July 12, 2021 (which predated the complaint herein by two days), the Findings of Fact and Conclusions of Law, dated August 31, 2022, and the Judgment of Divorce, also dated August 31, 2022, which were filed in the contemporaneously commenced (but since-concluded) uncontested divorce action entitled *Pietra Varbero v Anthony Charles Varbero*, index No. 553977/21 (Sup Ct, Kings County) (the “matrimonial action”). It is well established that “courts may take judicial notice of a record in the same court of either the pending matter or of some other action” (*Caffrey v N. Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 126 [2d Dept 2018]). Indeed, “[j]udicial notice may be taken by a court at any stage of the litigation” (*id.*; see also *Stella v Stella*, 92 AD2d 589, 590 [2d Dept 1983]).

⁵ Matrimonial Action, Findings of Fact and Conclusions of Law, § 3, Judgment of Divorce, at 2.

⁶ Matrimonial Action, Judgment of Divorce, at 3.

⁷ Complaint, ¶¶ 2, 5.

⁸ Complaint, ¶¶ 2, 32.

⁹ Complaint, ¶¶ 3, 30, 32.

marital home for Plaintiff and Pietra.¹⁰ Defendants also obtained a mortgage for the balance of the purchase price of the marital home.¹¹

Subsequent to Defendants' purchase of the marital home, Plaintiff and Pietra, with their then only child, moved into the marital home.¹² Two more children were born to Plaintiff and Pietra during their residence in the marital home.¹³ While residing in the marital home, Plaintiff was paying Calogero for the underlying mortgage (as well as for insurance and "other incidental[s]") in the aggregate amount of in excess \$100,000, with such payments coming out of his own funds and those of his family.¹⁴ In addition, Plaintiff had his mother move in and rent a smaller apartment in the marital home.¹⁵ During the same time period, Plaintiff was also forwarding to Calogero his mother's rent in the aggregate amount of in excess of \$100,000.¹⁶

With the marital home fully occupied by Plaintiff, Pietra, their three children, and Plaintiff's mother, Plaintiff made substantial upgrades to the marital home in the aggregate amount of in excess of \$150,000 for the period from 2017 through 2020.¹⁷ The substantial upgrades included "structural work (e.g.,] reconfiguring the [marital home], opening up cement walls, removing walls, updating plumbing, updating electrical,

¹⁰ Complaint, ¶¶ 15-16, 18. Plaintiff was Pietra's second husband (Complaint, ¶ 18 "[Calogero] received money from P. [Pietra] Calogero prior to her first divorce.").

¹¹ Complaint, ¶¶ 4, 8.

¹² Matrimonial Action, Judgment of Divorce, at 3.

¹³ Matrimonial Action, Judgment of Divorce, at 3.

¹⁴ Complaint, ¶¶ 4, 8, 38, 39.

¹⁵ Complaint, ¶¶ 4, 10.

¹⁶ Complaint, ¶¶ 10, 40.

¹⁷ Complaint, ¶¶ 9, 41.

installing a spiral staircase)[,] as well as installing new bathrooms, flooring, appliances, HVAC units, lighting, closets, doors, windows, fencing, security cameras, alarm system and a shed.”¹⁸

According to the complaint, the oral agreement between Plaintiff and Defendants was that “Defendants would transfer the [marital home] to . . . Plaintiff when . . . [the latter] was able to acquire his own mortgage or pay off the existing mortgage.”¹⁹ In fact, during Plaintiff’s and his family’s residence in the marital home, Calogero represented to, at least, one of the neighbors (as corroborated by the neighbor’s affidavit) and to, at least, one of the tradesmen working on the marital home (as corroborated by the plumber’s affidavit) that “Plaintiff was the *de[]facto* owner of the [marital home].”²⁰

Sometime thereafter (unspecified in the complaint), “Plaintiff informed Defendants of his ability to secure a mortgage on his own and/or pay off the current mortgage for the [marital home] for purposes of having the deed transferred to . . . Plaintiff.”²¹ Sometime thereafter (again unspecified in the complaint), “Defendants have refused to do so in violation of the prior agreement between . . . Plaintiff and Defendants.”²²

On November 4, 2021, Pietra commenced the matrimonial action for divorce and related relief as against Plaintiff. As part of the matrimonial action, Pietra filed a

¹⁸ Complaint, ¶¶ 9, 41.

¹⁹ Complaint, ¶ 33.

²⁰ Complaint, ¶ 7 (emphasis in the original); ¶¶ 34-35.

²¹ Complaint, ¶ 42.

²² Complaint, ¶ 43.

previously executed stipulation of settlement, dated as of July 12, 2021, pursuant to which Plaintiff agreed (in Article 16 thereof) to vacate the marital residence within 60 days of its execution, without any waiver of “any claims and/or filing any lawsuits in connection with the ownership, whether legal and/or equitable, of the marital [home].”²³

On July 14, 2021, concurrently with the execution of the stipulation of settlement in the matrimonial action, plaintiff commenced the instant action seeking, in essence, to declare – and, upon declaration, to impose – a constructive trust on the marital home (the first and second causes of action, respectively) (collectively, the “constructive trust claim”). His other claims – breach of fiduciary duty, unjust enrichment, fraudulent misrepresentation, negligent misrepresentation, and conversion – however labeled – rely on the same underlying contention that the marital home should be subject to a constructive trust in his favor (the third through seventh causes of action, respectively) (collectively, the “ancillary claims”). Plaintiff does not seek in the complaint the imposition of an equitable lien for the amount of restitution allegedly due to him.²⁴

On August 31, 2021, defendants answered the complaint. On December 1, 2021, Defendants cross-moved to dismiss the complaint. On January 18, 2022, Plaintiff opposed by way of his counsel’s affirmation. After oral argument held on November 30, 2022, the Court reserved decision on the instant cross-motion.

²³ Matrimonial Action, Stipulation of Settlement, Article 16, ¶¶ 1-2.

²⁴ Complaint, Wherefore Clause, at 14.

Discussion

In the interest of brevity, the Court addresses those grounds for dismissal which are crucial to the determination of Defendants' cross-motion; namely: a failure to state a cause of action, pursuant to CPLR 3211 (a) (7), and the statute of limitations, pursuant to CPLR 3211 (a) (5), in each instance, with respect to Plaintiff's constructive trust and ancillary claims.

Constructive Trust Claim

"A constructive trust will be impressed upon property when, [1] in the context of a fiduciary relationship, [2] there has been a transfer of the property [3] in reliance upon a promise, and [4] an unjust enrichment as a result thereof" (*Gargano v V.C. & J. Const. Corp.*, 148 AD2d 417, 418 [2d Dept 1989]). As to the first element, the existence of a fiduciary relationship between Plaintiff and his in-laws is indisputable (*see Henning v Henning*, 103 AD3d 778, 780 [2d Dept 2013]; *Rowe v Kingston*, 94 AD3d 852, 853-854 [2d Dept 2012]). Accepting that Plaintiff has satisfied the second element by pleading that Defendants promised to convey the marital property to him, he has failed to plead the third element, which requires allegations that he acted in reliance on the promise.²⁵ Because Plaintiff had no actual prior interest in the marital home,²⁶ he was required to

²⁵ Put another way, "no constructive trust will be imposed by one who has no interest in the property *prior to* obtaining a promise that such an interest will be given to him" (*Schwab v Denton*, 141 AD2d 714, 715 [2d Dept 1988] [internal quotation marks omitted; emphasis added], *lv denied* 73 NY2d 701 [1988]).

²⁶ Compare *Gottlieb v Gottlieb*, 166 AD2d 413, 414 (2d Dept 1990) (contributions toward purchase and improvement of subject property sufficient to fulfill the "transfer in reliance" element); *Mendel v Hewitt*, 161 AD2d 849, 850 (3d Dept 1990) (plaintiff's contribution of funds toward the purchase and improvement of property to which he had never held an interest deemed sufficient to fulfill "transfer in reliance" element); *Washington v Defense*, 149 AD2d 697, 698-699 (2d Dept 1989) (the interest in property for the "transfer in reliance" purposes fulfilled where plaintiff expended money, labor and time in acquiring and improving the subject property, even
(footnote continued)

plead that an equitable interest developed through the expenditure of time, money, and labor (*see Henning*, 103 AD3d at 780; *Marini v Lombardo*, 79 AD3d 932, 934 [2d Dept 2010], *lv denied* 17 NY3d 705 [2011]). Crucially, plaintiff failed to plead that most (if not all) of the improvements he undertook on the marital home over the years were principally made for Defendants' benefit, rather than for his benefit or that of his wife, children, and mother (*see Henning*, 103 AD3d at 780; *Marini*, 79 AD3d at 934; *Matter of Lefton [Bedell]*, 160 AD2d 702, 704 [2d Dept 1990]). In addition, Plaintiff failed to plead that the mortgage, his mother's rents, and other incidentals which he paid to Calogero over the years could be considered expenditures made in reliance on any alleged promise by Defendants to convey title to the marital home to him, rather than as attributable to the rent he paid for its use by his family (*see Manufacturers & Traders Tr. Co. v Berthole*, 130 AD3d 881, 882 [2d Dept 2015], *lv dismissed* 26 NY3d 1022 [2015]; *Rock v Rock*, 100 AD3d 614, 617 [2d Dept 2012]; *Schwartz v Miltz*, 77 AD3d 723, 725 [2d Dept 2010]; *Mente v Wenzel*, 178 AD2d 705, 706 [3d Dept 1991]; *Matter of Lefton [Bedell]*, 160 AD2d at 703-704). Lastly, plaintiff failed to adequately plead the fourth and final element of the constructive trust claim – the unjust enrichment – as he did not elaborate that Defendants (rather than his family) were the principal beneficiaries of the improvements to the marital residence (*see Broadway Cent. Prop. Inc. v 682 Tenant Corp.*, 298 AD2d 253, 254 [1st Dept 2002]).

though she never had actual title to same), *lv denied* 74 NY2d 609 (1989); *Lester v Zimmer*, 147 AD2d 340, 342-343 (3d Dept 1989) (“the transfer concept extends to instances, as here, where funds, time and effort [toward construction of a dwelling] are contributed in reliance on a promise to share in the result”).

More fundamentally, “[a] constructive trust is a ‘fraud-rectifying’ trust [or remedy,] rather than an ‘intent-enforcing’ trust [remedy]” (*Matter of Wells*, 36 AD2d 471, 474 [4th Dept 1971], *affd* 29 NY2d 931 [1972]). Nowhere in the instant complaint does Plaintiff allege that Defendants ever requested, demanded, or insisted that he undertake the improvements or repairs to the marital residence. Nothing in the instant complaint indicates that Defendants ever asked Plaintiff for any financial assistance, exerted any control over the repairs, or made any promise to him to pay for any portion of the repairs to the marital home.

Further, Plaintiff fails to allege that the constructive trust claim arose within six years preceding the inception of this action. In this regard, the assertion made by Plaintiff’s counsel (at page 8 of his affirmation in opposition) that “[t]he claim in this case did not accrue until the date [D]efendants alleged breach, which was June 30, 2021, through written communication,” is without probative value (*see Shickler v Cary*, 59 AD3d 700 [2d Dept 2009]; *Guzman v Mike’s Pipe Yard*, 35 AD3d 266 [1st Dept 2006]; *Steinberger v Steinberger*, 252 AD2d 578, 579 [2d Dept 1998]).

Ancillary Claims

As noted, Plaintiff’s ancillary claims are nothing more than a variation of Plaintiff seeking to hold Defendants liable based on the constructive trust theory. Plaintiff’s ancillary claims, as so unartfully pleaded, are subject to dismissal for both a failure to state a cause of action and as time-barred.

The parties’ remaining arguments either are without merit or need not be reached in light of the foregoing determination.

Conclusion

Based on the foregoing and after oral argument, it is hereby

ORDERED that Defendants' motion is **GRANTED**, and all of Plaintiff's claims, as pleaded in his complaint, are **DISMISSED** without costs or disbursements; and it is further

ORDERED that, as the result of the rulings made herein, the complaint is **DISMISSED** in its entirety; and it is further

ORDERED that the Kings County Clerk is directed to cancel the notice of pendency, dated July 14, 2021, indexed against Block 8595, Lot 39 (2272 56th Drive, Brooklyn, New York); and it is further

ORDERED that the parties' next appearance in the Note of Issue-Final Conference Part on May 11, 2023 is canceled; and it is further

ORDERED that Defendants' counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on Plaintiff's counsel and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the Decision, Order, and Judgment of the Court.

E N T E R,



HON. CAROLYN E. WADE
SUPREME COURT JUSTICE